IN THE

Supreme Court of the United States

October Term, 1976
No. 76-244

UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a Nevada corporation,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1976.

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Statement of the Case.

While petitioner's statement of the case is generally correct, it contains certain misleading statements which require comment. First, petitioner states that respondent ("MGM") opposed petitioner's motion for summary judgment by contending that the existence of factual issues precluded the granting of the motion (Petition, p. 6); while MGM indeed so contended, it also argued that, without regard to such issues, as a matter of law it was not required to have a contractor's license under the Nevada statute. Second, petitioner characterizes the decision of the court of appeals as having

held that "MGM could maintain the suit notwithstanding that it was acting in the capacity of an unlicensed contractor" (Petition, p. 7); here, petitioner relies upon only the last sentence of the opinion below, which is clearly dictum.* The decision of the court of appeals rested on "two independent reasons" (Petition, Appendix A, p. 4): the purpose of the statute would not be furthered by requiring both MGM and its managing contractor to be licensed as contractors, and the statute by its terms only applies to actions "for the collection of compensation for the performance of any act or contract for which a license is required" (NRS 624.320) Neither of these bases of decision assumes that MGM was "acting in the capacity of an unlicensed contractor," and the court of appeals did not so find.

*This misstatement is repeated at page 18 of the petition, where the decision of the court of appeals is described as

> "holding that where an unlicensed person who acts in the capacity of a contractor can demonstrate the 'builder competence' and 'financial responsibility' which the licensing statute contemplated, he can avoid the penalties ordinarily applicable to unlicensed contractors."

ARGUMENT.

The subject of the instant petition concerns only the application of a state licensing statute to the facts of a particular construction project; given the nature of this case, it is unnecessary to review at length the criteria governing the issuance of a writ of certiorari by this Court, which has stated that it "[does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925).

Petitioner has failed to show, pursuant to Rule 19 of the rules of this Court, any compelling reason for the granting of the writ in this case. No conflict among the circuits, no important constitutional question, no novel issue requiring this Court's attention, has been shown. The petition represents simply an effort to reinstate a summary judgment which has received considered review in the court of appeals and which, until reversed, had the effect of barring MGM's action on a defense wholly unrelated to the merits of the claim.

Furthermore, it must be pointed out that petitioner here seeks review of a nonfinal judgment—the court of appeals remanded the case for trial and if petitioner prevails on the merits, the whole question of the licensing defense will be moot. While certain unusual circumstances have, on prior occasions, resulted in this Court's issuance of writs of certiorari to review interlocutory decisions of the circuit courts, such decisions generally do not merit review by certiorari.

> "[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it

is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

American Construction Co. v. Jacksonville T. & K. W. Ry. Co., 148 U.S. 372, 384, 13 S.Ct. 758, 763 (1893).

Thus, this Court has denied the petition for a writ of certiorari where the court of appeals has remanded the case to the district court, holding that the case was "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen, etc. v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 438 (1967). This Court's general rule against granting a writ of certiorari to review an interlocutory decision is unaffected by the Interlocutory Appeals Act of 1958, 28 U.S.C. §1292(b), pursuant to which the court of appeals reviewed the instant case. R. Stern and E. Gressman, *Supreme Court Practice* §420 (4th ed. 1969).

Petitioner asserts two reasons for review by this Court, one dealing with application of Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), the other dealing with the ascertaining of state law by a federal appellate court reviewing a diversity case. For the reasons explained below, neither of these subjects raises any significant issue on the record in this case. In applying Rule 56 and in determining applicable Nevada law, the court of appeals followed familiar rules of appellate review; the result below, while unsatisfactory to petitioner (who would prefer to avoid having MGM's claim tried on its merits), involved no aberration from those rules and presents no federal question requiring review by this Court.

I.

The Decision of the Court of Appeals Was in Harmony With the Familiar and Accepted Rules Governing Summary Judgment.

Petitioner's contention that the court of appeals somehow misapplied Rule 56, in reversing the trial court's granting of petitioner's motion for summary judgment, is based upon the erroneous assertion that the court of appeals "adopted" the facts set forth in MGM's opposing affidavits and thereby indulged in improper resolution of factual issues (Petition, pp. 8, 10). Yet all of the facts necessary to support the first basis of the decision were either established or conceded in petitioner's own papers, and the second basis of the decision rested solely on the pleadings.

The relationship between MGM, as owner, and Taylor Construction Company ("Taylor"), as the owner's managing contractor, was established by petitioner's original motion, which contained copies of the contracts between MGM and Taylor [C.R. 213-266] and between MGM and Taylor, on the one hand, and Imperial Glass Co. ("Imperial"), on the other hand [C.R. 285-321]; Taylor's licensed status, while directly established in MGM's opposing papers [C.R. 595], was admitted in petitioner's original motion [C.R. 332] and in its supplemental memorandum of points and authorities in support of the motion [C.R. 771]. Finally, petitioner's original motion virtually conceded that the work at issue "was actually performed by a licensesd contractor [*i.e.*, Taylor]" [C.R. 332], and the opinion of the State Contractors' License Board (which had investigated charges that Taylor had improperly dealt with MGM as an unlicensed contractor), put in evidence by petitioner, recited that Taylor "was the Managing

Contractor in charge of the MGM Grand Hotel project . . ." [C.R. 674]. Petitioner's motion did not contend that Taylor had not acted in the capacity of a contractor, but argued that Taylor's so acting did not exclude the possibility that MGM had acted in the capacity of a contractor and did not excuse any resulting violation by MGM of the Nevada licensing statute [C.R. 332-337]. Thus, the court of appeals correctly perceived petitioner's contention to be that both Taylor and MGM required contractors' licenses. In rejecting that contention, the court of appeals assumed only those facts which petitioner, in making its motion, had asked it to assume and had asserted were undisputed.

Although petitioner states that the decision of the court of appeals "presumbly rests" on assumptions that Taylor had total responsibility for supervising construction of MGM's hotel and that MGM was financially responsible (Petition, p. 10), the decision does not "rest" on those assumptions. In pointing out that Taylor's licensed status meant that the State Contractors' License Board ("the Board") was in a position to monitor the progress of the construction project should doubts arise concerning its financial stability, the court of appeals indicated that the premise of its decision (under the first reason for its conclusion) was the fact that MGM was "operating hand in hand with a licensed contractor" (Petition, Appendix A, p. 6). This rationale does not require assumptions that Taylor had "total responsibility" for supervising the project or that MGM was financially responsible (although such assumptions were justified by the record). Taylor's undisputed status as a licensed contractor was sufficient to support the conclusion of the court of appeals that the Nevada statute did not require MGM also to be licensed.

Even though the decision of the court of appeals does not rest upon improper resolution of factual issues, it is unnecessary for this Court so to determine: the second stated reason for the decision is based entirely on the allegations of the complaint and the clear wording of NRS 624.320, and has nothing to do with any asserted facts. As MGM pointed out in its opening brief before the court of appeals (p. 33), a number of courts have held that statutes such as NRS 624.320 operate to bar only actions for compensation for work for which a license is required and do not apply to actions for damages for breach of contract.* The court of appeals decided that it was far more reasonable to assume that the Nevada Supreme Court would follow these cases, if confronted with the issue, than to assume that that court would stretch the plain words of the statute to effect a drastic forfeiture in a case clearly beyond the policy of the statute. In so concluding, the court of appeals had to look no further than MGM's complaint, and was not obliged to accept any facts as undisputed.

Although petitioner argues, incorrectly, that the decision of the court of appeals rests upon improper resolution of disputed facts, such an argument is manifestly impossible to sustain where it appears that the decision is supportable without regard to any arguable issues of fact. Petitioner contends that MGM's assertion below that material issues of fact precluded the granting of the motion for summary judgment, is inconsistent with MGM's prevailing on petitioner's licensing defense

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*E.g., *Lake States Engineering Corp. v. Lawrence Seaway Corp.*, 15 Mich.App. 637, 656, 167 N.W.2d 320, 331 (1969); *Institute for Essential Housing, Inc. v. Keith*, 76 N.M. 492, 494, 416 P.2d 157, 158 (1966); *Edmonds v. Fehler & Feinauer Construction Co.*, 252 F.2d 639, 642 (6th Cir. 1958).

as a matter of law (Petition, p. 8). There is no merit to this contention. MGM argued below that NRS 624.320 was, on its face, inapplicable to the situation in which an owner hires a licensed contractor as its managing contractor (App. Op. Br. pp. 27-32); MGM further contended that even if the statute could be read in a way which would permit such an owner to be defined as a "contractor," a material issue of fact existed as to whether MGM had indeed acted in that capacity (App. Op. Br. pp. 37-38). Because the court of appeals accepted the former contention, it correctly concluded that it was unnecessary to reach the latter contention. Thus, MGM's argument below concerning the existence of factual issues was not inconsistent with the position, accepted by the court of appeals, that those issues need not be considered, given the clear inapplicability of NRS 624.320 to the facts set forth in petitioner's moving papers.

> "Even where the non-movant vigorously opposes a motion for summary judgment on ground [sic] triable issues of fact exist, the trial court is not precluded from entering summary judgment for the non-movant if, in reality, no factual dispute exists and the non-movant is entitled to summary judgment as a matter of law."
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> 6 *Moore's Federal Practice* ¶56.12, at 56-334 (2d ed. 1976).

See also Federal Deposit Insurance Corp. v. Sumner Financial Corp., 376 F.Supp. 772, 776 (M.D.Fla. 1974).

With respect to the contention that MGM has improperly been granted partial summary judgment, it must be noted that petitioner's answer [C.R. 49-60]

did not raise any defense based upon the Nevada licensing statute; that defense was tendered for the first time when, more than a year after the commencement of the action, petitioner and Imperial invoked NRS 624.320 in moving for summary judgment. Had the district court correctly ruled upon the motion, in conformity with the views expressed by the court of appeals, it would not have granted partial summary judgment to MGM (there being no issue in the pleadings regarding NRS 624.320), but would simply have ruled against petitioner on the issue of law tendered by its motion. There is, of course, no guarantee that a party moving for summary judgment under Rule 56 will prevail on the legal issues presented by his motion, even if he succeeds in showing an absence of issues of material fact; in many instances federal courts have indeed granted summary judgment to parties opposing the motion, even though they have not made cross-motions of their own. *E.g., Local 33, Int. Hod Carriers, etc. v. Mason Tenders, etc.*, 291 F.2d 496, 505 (2d Cir. 1961); *Briscoe v. Compagnie Nationale Air France*, 290 F.Supp. 863, 867 (S.D.N.Y. 1968); *LeMon v. Zelker*, 358 F.Supp. 554, 555 (S.D.N.Y. 1972). *See also* 6 *Moore's Federal Practice* ¶56.12 (2d ed. 1976). However, the granting of summary judgment to the non-moving party is not at issue here, because no such order was made below; the court of appeals has simply held that petitioner was not entitled to prevail on the legal theory which it had chosen to present by its motion. Certainly no significant question under Rule 56 is presented by such a result.

II.

The Court of Appeals Properly Performed Its Obligation to Ascertain State Law Regarding an Issue Which Has Not Been Addressed by the Nevada Supreme Court.

Petitioner recognizes that in ruling upon the order granting summary judgment, the court of appeals was required to ascertain Nevada law regarding an issue never ruled upon by the Nevada Supreme Court (Petition, p. 11). Petitioner's argument that the court of appeals improperly discharged this function rests upon the interrelated contentions that the court of appeals (a) should have assumed that the Nevada Supreme Court would have adopted California opinions construing the California licensing statute, and (b) should have disregarded the decision of the Nevada trial court which had, on like facts, rejected the position that NRS 624.320 bars damage actions by owners who have retained licensed managing contractors. Both contentions lack merit. Because the ascertainment of state law by the court of appeals was entirely in conformity with established principles prevailing in diversity cases, there is no compelling reason for this Court to perform that task *de novo*.

A. The Court of Appeals Properly Concluded That the Nevada Supreme Court Would Follow Those Courts of Other States That Have Refused to Apply Licensing Laws to Situations Beyond the Language or the Policy of the Statutes.

In arguing the applicability of various California decisions under the California licensing law, petitioner simply repeats its reliance upon the cases discussed in its brief in the court of appeals. As pointed out in MGM's reply brief in the court of appeals, none of these cases deals with the situation of an owner's retaining

a licensed general contractor who acts as managing contractor. Petitioner relies chiefly on cases dealing with parties which are undeniably engaged in the contracting business, which hold themselves out as such, and which render services as contractors; in resisting the application of licensing statutes such as NRS 624.320, such parties do not deny they are "contractors" but usually assert that the invalidity of their licenses is attributable to wholly technical defects, or that their contracting activity substantially complied with the law because someone on the job was duly licensed. Other cases cited by petitioner deal with parties who are not regularly engaged in the contracting business but hold themselves out to the public as ready and able to perform contracting services. None of these cases has any bearing on the status of an owner (like MGM) which is *not* in the contracting business, which does *not* hold itself out to the public as a contractor, and which does *not* purport to have the expertise as a contractor necessary to build a multimillion dollar structure.* Petitioner incorrectly states that the court of appeals recognized the existence of cases barring an action "under these same circumstances" (Petition, p. 11)—the cases referred to (cited in footnote 11 of the decision below—Petition, Appendix A, p. 6) did *not* deal with "these same circumstances," but were cited only to acknowledge that the licensing laws have been applied, outside Nevada, to bar actions for breach

*The Nevada Attorney General, in construing the predecessor of NRS chapter 624, has stated that the statute was intended by the legislature "to provide a policing measure governing the activities of all persons who act as independent contractors *and hold themselves out as persons qualified and capable of entering into and performing all or some of the activities set forth in [the statute]*." Op. Att'y Gen. July 1, 1948 to June 30, 1950 144, 149 (1949) (Emphasis added).

of contract as well as actions for compensation for services.

It is also untrue, as petitioner asserts, that the Nevada Supreme Court has "relied almost totally on California precedent" in construing NRS chapter 624, (Petition, pp. 11-12); the Nevada case referred to in the decision of the court of appeals, *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968) (Petition, Appendix F, pp. F-18 to F-25), relies principally upon decisions from Illinois and New York and cites a California decision only to emphasize the point argued below by MGM, *i.e.*, that a forfeiture is not to be condoned absent any ascertainable public policy so requiring. The fact of the matter is that appellate decisions throughout the country construing contractors' licensing laws are relatively few; these opinions, such as they are, necessarily resort to whatever pertinent cases may exist in the reports of sister states, depending upon similarity of facts and persuasiveness of reasoning. Nothing in Nevada law indicates that the Nevada Supreme Court has chosen in this area to follow California law—or the law of any other state—without regard to the facts of the particular case and the policy considerations raised by those facts. Having argued successfully below that the California licensing law cannot apply to a construction project in Nevada (Petition, Appendix C, pp. C-22 to C-33), petitioner now argues, in effect, that while Nevada may properly insist on applying its own statute to construction projects in Nevada, it is obliged to construe its statute in conformity with California decisions interpreting the California statute. The court of appeals correctly refused to find such an obligation and properly opined that on the facts of this case

the Nevada Supreme Court would pronounce Nevada law in a manner consistent with the words and the purpose of NRS 624.320, both of which are incompatible with the position advanced in petitioner's motion for summary judgment. Petitioner fails to explain why it was improper for the court of appeals to assume that the Nevada Supreme Court would follow the decisions of the courts in Michigan and New Mexico, and the Court of Appeals for the Sixth Circuit (applying Kentucky law), which have held statutes similar to NRS 624.320 not to apply to actions for damages for breach of contract,* rather than decisions from California and New Mexico, which have reached the opposite conclusion. It is apparent that petitioner is aggrieved not because the court of appeals attributed to the Nevada Supreme Court a position unsubstantiated by logic or case law from other states—such substantiation clearly exists—but because the court below did not pronounce Nevada law to be as petitioner wishes it to be. This dissatisfaction with an entirely reasonable result hardly merits the issuance of a writ of certiorari.

B. The Court of Appeals Properly Gave Consideration to the Decision of the Nevada District Court Which Rejected the Conclusion of the Federal District Court in This Case.

While the appeal below was pending in the court of appeals, the Nevada District Court, sitting in Clark County, handed down a written opinion in the case of *Las Vegas International Hotel, Inc. v. Argonaut Insurance Co.*, No. A 93354 (May 28, 1975) (Appendix A to this brief). In that case, the court denied defendant's motion for summary judgment, which motion was based on facts similar to those of the instant

*See citations in footnote, page 7, *supra*.

case and on the same legal contention asserted by petitioner in the instant case; in denying summary judgment, the Nevada court expressly rejected the reasoning of the federal district court which had granted summary judgment herein. The court of appeals recognized that it was not bound by this state court opinion but did "regard it as persuasive authority" in support of its decision to reverse (Petition, Appendix A, p. 4, n.5). Petitioner argues that the state court opinion "should not have been considered" below (Petition, p. 14). As it did in its brief to the court of appeals, petitioner oversimplifies the issue, insisting that absent a controlling decision by the Nevada Supreme Court, any indicia of state law not in conformity with petitioner's position be summarily and entirely disregarded. The court of appeals, cognizant of its duties under *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938), properly refused to adopt the simplistic analysis espoused by petitioner.

MGM did not (and does not) contend that the court of appeals was bound by the decision of the state court in the *International Hotel* case. However, it was entirely proper for the court of appeals to give some consideration to that decision; such consideration was virtually obligatory under *Vandenbark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S.Ct. 347 (1941), which makes it clear that a federal appellate court reviewing a diversity case must take into consideration pronouncements of state law which are made after the time of the decision under review. *See also Peterson v. Allcity Ins. Co.,* 472 F.2d 71, 79 n.12 (2d Cir. 1972). While the Court in *Vandenbark* spoke in terms of the lower appellate court's duty "to apply state law . . . in accordance with

the then controlling decision of the highest state court" (311 U.S. at 543, 61 S.Ct. at 350), both parties in the instant case acknowledge that the highest court of the state (*i.e.,* the Nevada Supreme Court) has never decided the issue ruled upon below. Petitioner recognizes the pertinence of *Vandenbark:* it does not challenge the relevance of the Nevada state court decision on the ground that the decision came after the ruling of the federal district court, but rather on the ground that the decision emanated from a state trial court.*

Were *Vandenbark* the last word from this Court in the pertinent area of *Erie* jurisprudence, it might be argued that *Vandenbark* is limited to situations involving intervening decisions from "the highest court of the state." That position was expressly rejected in *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 61 S.Ct. 176 (1940), and *West v. American Tel. & Tel. Co.,* 311 U.S. 223, 61 S.Ct. 179 (1940). In the latter case, this Court stated as follows:

> "A state is not without law save as its highest court has declared it. There are many rules of deci-

*Petitioner has cited wholly inapplicable authorities in attempting to show that the decision of the Nevada District Court is a nullity. Rule 224 of the Nevada Supreme Court (presumably referred to at page 14 of the petition, there being no "Rule 244"—petitioner cited Rule 224 in its brief before the court of appeals) says nothing whatever about the weight of trial court opinions. (A copy of Rule 224 is set forth in Appendix B of this brief.) *Ormachea v. Ormachea,* 67 Nev. 273, 217 P.2d 355 (1922) (Petition, pp. 14-15), dealt neither with a summary judgment nor with the issue of the value as precedent of a trial court opinion; the portion of *Ormachea* cited by petitioner, and the corresponding portion of *Hunter v. Sutton,* 45 Nev. 430, 205 P. 785 (1922) (Petition, p. 15), concerned the effect of a trial court opinion on an appeal from the very decision in which that opinion was rendered (67 Nev. at 295; 45 Nev. at 439).

sion commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain *from all available data* what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts" (311 U.S. at 236-237, 61 S.Ct. at 183; emphasis added).

The very case relied upon by petitioner, *King v. Order of United Commercial Travelers,* 333 U.S. 153, 68 S.Ct. 488 (1948) (Petition, p. 14), teaches that the federal circuit court will properly attribute some weight to the decision of the state trial court on a question of first impression; significantly, in *King* the federal circuit court had considered a subsequent state court decision which (unlike the Nevada court decision here) relied upon the very decision on appeal in the federal court (333 U.S. at 156-157, 68 S.Ct. at 490). Furthermore, in *King* this Court cited *Vandenbark* in justifying its consideration (although "not as a controlling factor") of a second state trial decision handed down during the pendency of the appeal in this Court (333 U.S. at 162, 68 S.Ct. at 493).

The rationale of *Fidelity Union Trust Co.* and *West* finds expression in the more recent case of *Royal Indemnity Co. v. Clingan,* 364 F.2d 154 (6th Cir. 1966), which provides an exact parallel to the sequence of events in the appeal of the instant case below. In *Royal Indemnity,* the federal district court had decided a question of Tennessee law as to which there was no precedent in the reported decisions of the Tennessee appellate courts. Appellant cited to the federal appellate court an unreported decision of a Tennessee court of original jurisdiction, handed down some months after the decision by the federal district court; the state court expressly declined to follow the decision of the federal district court. Reversing (in pertinent part), the appellate court gave weight to the state court's decision in determining the controlling law of Tennessee in the case before it, and concluded that the Tennessee Supreme Court would reach the same conclusion as that reached by the lower state court; the appellate court remarked that the state court decision "was not available to the district judge at the time he rendered his opinion in this case" (364 F.2d at 158). *Royal Indemnity* was followed in *Bradley v. General Motors Corp.,* 512 F.2d 602, 605 (6th Cir. 1975), wherein the court of appeals declared that it "may give weight to the decision of a [state] trial court in determining what is the controlling law of Tennessee." Furthermore, the United States District Court for the District of Nevada itself has recently turned to a Nevada trial court decision in determining Nevada law regarding issues not addressed by the Nevada Supreme Court, finding in that decision "persuasive authority with respect to the proper interpretation of

the [pertinent] Nevada statute." *Moen v. Las Vegas International Hotel, Inc.*, 402 F.Supp. 157, 159 (D. Nev. 1975).

The court of appeals was not bound by the district court's legal conclusions concerning state law in the instant diversity case. *Funk v. Tifft*, 515 F.2d 23, 25 (9th Cir. 1975). Ascertainment of that law was the task of the court of appeals in reviewing the order granting summary judgment, and, by virtue of the cases cited above, the task included taking into consideration the state court decision which was rendered during the pendency of the appeal. The court of appeals did not regard the state court decision as having foreclosed the issue of state law before it in the instant case, but simply pointed out that the state court decision supported its conclusion. In treating the state court decision as a helpful indication, rather than a controlling determination, of Nevada law, and in providing convincing reasoning for its opinion concerning what the Nevada Supreme Court would declare that law to be, the court of appeals correctly performed its duty of appellate review consistent with recognized *Erie* principles.

Petitioner would have this Court believe that the Ninth Circuit departed from precedent in giving consideration to a state trial court's decision in the instant case; petitioner cites *Curry v. Fred Olson Line*, 367 F.2d 921, 924 n.10 (9th Cir. 1966), *cert. denied*, 386 U.S. 971, 87 S.Ct. 1165 (1967), as a case in which the court of appeals "refused to give . . . weight to California trial court decisions" (Petition,

p. 15). This is a highly misleading characterization of the cited case—in *Curry*, the court of appeals did indeed look to state trial court opinions for guidance as to applicable state law, but noted that the two opinions referred to cited no prior authority and stated that "[t]hese decisions are of little help to us." Implicit in footnote 10 of the *Curry* opinion is the assumption that the state trial court decisions there referred to were not automatically disregarded because of their origin, were indeed relevant as pronouncements of state law (as no California appellate court had passed on the issue at bar), but were simply unilluminating and were less helpful as indicia of state law than related statutes and state appellate decisions that indicated more clearly how the California Supreme Court would presumably rule on the question at issue (367 F.2d at 926-928).

It should be noted that although petitioner attempts to raise a spectre of uncertainty in the law resulting from the ruling below, that ruling serves the fundamental interest of certainty in diversity cases that *Erie* and its progeny aimed to achieve. The court of appeals has not presumed to interpret the contractors' license statute of any state other than Nevada, and has construed the Nevada statute in the same way as the Nevada District Court. The decision of the court of appeals deprives litigants in Nevada of any undue advantage which might otherwise be gained in maneuvering a case involving NRS 624.320 into, or out of, the state court which decided the *International Hotel*

case, as opposed to the United District Court for the District of Nevada; such forum shopping might well have resulted had not the court of appeals reversed the decision of the federal district court.*

No aberration from familiar *Erie* principles can be shown in the decision of the court of appeals, and nothing in that court's ascertainment of state law warrants the issuance of a writ of certiorari.

C. The Decision of the State Contractors' License Board, Which Was Part of the Record Below, Corroborates the Conclusion of the Court of Appeals Concerning the Applicability of NRS 624.320.

The record before the court of appeals included a transcript of the Board's proceedings wherein the Board had investigated the MGM Grand Hotel project and concluded that Taylor had not aided and abetted, or entered into a contract with, an unlicensed contractor in dealing with MGM [C.R. 579-596, 611-660]. More specifically, the Board determined that Taylor "was acting as a general contractor for MGM" and that MGM "was not required to be licensed by the Board" [C.R. 596]. Although not referred to in the decision of the court of appeals, the Board's determination

*After the denial of its motion for summary judgment in the *International Hotel* case, the defendant removed the case to the United States District Court for the District of Nevada; it would seem clear that the obviously untimely petition for removal (filed in December of 1975, more than four years after commencement of the action) was prompted by the desire to take advantage of the prior ruling of the federal district court in the instant case. The federal district court rejected this ploy and granted the plaintiff's motion to remand to the state court (see Appendix C to this brief). Thus, efforts at forum shopping were already apparent in Nevada before the court of appeals precluded such efforts by reversing the decision of the federal district court.

provides further evidence of the correctness of that decision. A state agency's ruling

> "may sometimes constitute the only 'law' of the state . . . and [should be followed] when . . . it appears consistent with the policy of the state statute."
>
> *Dickinson v. First Nat'l Bank,* 400 F.2d 548, 558 (5th Cir. 1968), *aff'd,* 396 U.S. 122, 90 S.Ct. 337 (1969).

See also Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 463 F.2d 470, 482-483 (3d Cir. 1972), *cert. denied,* 410 U.S. 913, 93 S.Ct. 966 (1973).

While the decision of the court of appeals did not rely upon the Board's determination that MGM did not require a contractor's license, that determination is nevertheless relevant to the instant petition. It is petitioner's contention that the decision of the court of appeals poses a threat to the effectiveness of the contractors' licensing laws in five states (two of which are not even part of the Ninth Circuit), because it "is contrary to the holding of virtually every state court which has ruled on this issue . . ." (Petition, p. 18). In fact, no state appellate court has "ruled on this issue"—if there is such a reported ruling, it escaped all the briefs presented to the court of appeals and is obviously absent from the instant petition—and the one state trial court which is known to have ruled on the issue (the Nevada District Court in the *International Hotel* case) rejected petitioner's position. The decision below dealt only with the situation of an owner who retains a licensed general contractor as his managing contractor, and dealt only with the contractors' licensing statute in the State of Nevada; when any state or federal court is called upon to construe the contractors' licensing statute of some other state,

nothing in the decision below will require a result inconsistent with the perceived scope of that other statute. Furthermore, it cannot legitimately be argued that the decision below poses any threat to the State of Nevada when the duly empowered agency of that state has found no violation of the statute on the very construction project here at issue. The bugaboo raised by petitioner could conceivably constitute a genuine concern, had the decision of the court of appeals contravened some pronouncement of the Board or the Nevada courts to the effect that MGM, or similarly situated owners, require licenses despite their retention of licensed managing contractors. But, as pointed out above, both the Board and the state judiciary have spoken precisely to the contrary, in harmony with the decision below. The false fears raised in the petition merit no attention by this Court.

Conclusion.

The court of appeals correctly determined, under familiar standards governing Rule 56, that petitioner was not entitled to summary judgment; that determination did not rest upon any improper assumptions of facts. The court of appeals reversed the summary judgment entered by the district court because the appellate court concluded, after sound analysis of the purpose and scope of NRS 624.320, that the lower court had applied the statute to a situation it was not intended to reach. In so ruling, the court of appeals properly ascertained Nevada law on a question never addressed by the Nevada Supreme Court, finding guidance in a state court opinion handed down during the pendency of the appeal. The decision below is well supported by the case law governing its process of ascertaining

state law in a diversity case and by the logic of its result. Neither the process nor the result of the decision of the court of appeals warrants review by this Court; accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK ROTHMAN,
Attorney for Respondent.

CHARLES M. STERN,
DAVID GOLDWATER,
Of Counsel.

APPENDIX A.

Case No. A 93354, Dept. No. VI.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

Las Vegas International Hotel, Inc., Plaintiff, vs. Argonaut Insurance Company, Defendant. Argonaut Insurance Company, Cross-Plaintiff, vs. Las Vegas International Hotel, Inc., Cross-Defendant.

Filed: May 28, 1975.

Decision and Order.

Plaintiff initiated this action August 31, 1971, because of defendant's alleged failure to fully and satisfactorily perform a contract entered into December 2, 1968, between Taylor of Nevada, Inc. as general contractor for plaintiff owner and the defendant. On February 26, 1975, defendant filed a motion for summary judgment on the specific ground that plaintiff cannot prove that it is a duly licensed contractor under the laws of this state and therefore is precluded by statute from recovering. Relying upon the facts as they have been tendered to the Court by both parties, without further inquiry, the Court is not persuaded that defendant is entitled to judgment as a matter of law.

Defendant relies heavily on the recent order granting summary judgment in *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, (Civil LV 2032) in the United States District Court of Nevada, wherein that court was confronted with a situation much like that presented in the instant case. This Court is not necessarily of the opinion that the trial judge was correct in his finding that an owner who employs a managing contractor is itself a contractor within the purview of

NRS 624.020(2) which provides, inter alia, that any person[1] who ". . . does himself or by or through others construct . . . any building. . . ." is a contractor. However, assuming arguendo that such a proposition is correct, the Court is not now persuaded that plaintiff's right to satisfactory performance on the various subcontracts involved should be foreclosed for failure to possess a valid Nevada contractor's license.

NRS 624.320 simply prohibits one acting in the capacity of a contractor from maintaining any action ". . . for the *collection of compensation* for the performance of any act or contract for which a license is required. . . ." (Emphasis added.) This Court cannot agree with the Federal judge's extension of such prohibition, just as it cannot agree that the failure to possess such a license, an unlawful act (NRS 624.230), automatically taints all contracts of the owner.

That the statutory scheme of NRS Chapter 624 was designed to protect the public goes without question, but the prohibition laid down in *MGM* can hardly be said to be in the interest of the public. *MGM* sanctions the anomalous situation of relegating an owner to a position where it cannot protect the public from the shoddy workmanship of its subcontractors if it cannot enforce the latter's bond which has been given to secure such a lack of solicitude.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

DATED this 28th day of May, 1975.

/s/ Howard Babcock
DISTRICT JUDGE

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[1]The term "person" includes an individual, firm, copartnership, corporation, association or organization, or any combination thereof. NRS 624.030.

APPENDIX B.

Rule 224. *Judicial opinions.*

1. In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

2. It is desirable that justices of the supreme court, in reversing cases and granting new trials, should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

3. But the volume of reported decisions is such and is so rapidly increasing that, in writing opinions which are to be published, justices of the supreme court may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

4. It is of high importance that the justices of the supreme court should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A justice of the supreme court should not yield to pride of opinion or value more highly his individual reputation than that of the court, to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in the supreme court.

APPENDIX C.

In the United States District Court for the District of Nevada.

Argonaut Insurance Company, Petitioner, vs. Las Vegas International Hotel, Inc., Respondent. Civil LV 75-234 RDF.

Order Granting Motion to Remand.

The motion of respondent (plaintiff) to remand, filed December 16, 1975, is granted.

Within 10 days after respondent's (plaintiff's) costs are fixed, in accordance with Local Rule 20, the petitioner (defendant) shall pay the same. If not so paid, petitioner (defendant) shall have judgment against Safeco Insurance Company upon its removal bond for the amount of costs allowed, not to exceed $250.00.

Pursuant to Local Rule 13, petitioner's (defendant's) counsel will show cause before this Court at 10:00 A.M., Friday, January 9, 1976, why sanctions sought by respondent (plaintiff) should not be imposed against him.

Dated: December 19th, 1975.

Roger D. Foley
DISTRICT JUDGE